

1 Honorable Ricardo S. Martinez
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 TRUXEDO, INC. AND EXTANG CORP.,

11 Case No. 2:18-cv-01498

12 Plaintiffs,

13 TYGER AUTO, INC. AND JOHN DOE
14 CORPORATIONS 1-5,
15 Defendants.

16 **AGREEMENT REGARDING
17 DISCOVERY OF
18 ELECTRONICALLY STORED
19 INFORMATION AND ORDER**

20 The parties hereby stipulate to the following provisions regarding the discovery of
21 electronically stored information (“ESI”) in this matter:

22 **A. General Principles**

23 1. An attorney’s zealous representation of a client is not compromised by
24 conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation
25 to cooperate in facilitating and reasonably limiting discovery requests and responses raises
litigation costs and contributes to the risk of sanctions.

26 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be
applied in each case when formulating a discovery plan. To further the application of the
proportionality standard in discovery, requests for production of ESI and related responses
should be reasonably targeted, clear, and as specific as possible.

1 **B. ESI Disclosures**

2 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by
3 the parties, each party shall disclose:

4 1. Custodians. The five custodians most likely to have discoverable ESI in their
5 possession, custody or control. For avoidance of doubt, each Plaintiff must separately disclose
6 five custodians. The custodians shall be identified by name, title, connection to the instant
7 litigation, and the type of the information under his/her control.

8 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g.
9 shared drives, servers, etc.), if any, likely to contain discoverable ESI.

10 3. Third-Party Data Sources. A list of third-party data sources, if any, likely
11 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”
12 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to
13 preserve information stored in the third-party data source.

14 4. Inaccessible Data. A list of data sources, if any, likely to contain
15 discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to
16 specifically identify the data source) that a party asserts is not reasonably accessible under
17 Fed. R. Civ. P. 26(b)(2)(B). Absent a showing of good cause, the following categories are
18 deemed not reasonably accessible and need not be collected and preserved.

19 a. PDAs, mobile phones, text messages, instant messages, chats, and
20 personal social media posts on third party websites (e.g. LinkedIn, Instagram, Pinterest,
21 Twitter, etc.).

22 b. Voicemails that are not contained, documented, or recorded in email.

23 c. Any form of media upon which backup data is maintained in a party’s
24 normal or allowed processes, including but not limited to backup tapes, disks, SAN and other
25 forms of media.

1 **C. Preservation of ESI**

2 The parties acknowledge that they have a common law obligation to take reasonable
3 and proportional steps to preserve discoverable information in the party's possession, custody
4 or control. With respect to preservation of ESI, the parties agree as follows:

5 1. Absent a showing of good cause by the requesting party, the parties shall not
6 be required to modify the procedures used by them in the ordinary course of business to back-
7 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in
8 their possession, custody or control.

9 2. All parties shall supplement their disclosures in accordance with Rule 26(e)
10 with discoverable ESI responsive to a particular discovery request or mandatory disclosure
11 where that data is created after a disclosure or response is made (unless excluded under
12 (C)(3) or (D)(1)-(2) below).

13 3. Absent a showing of good cause by the requesting party, the following
14 categories of ESI need not be preserved:

15 a. Deleted, slack, fragmented, or other data only accessible by forensics.
16 b. Random access memory (RAM), temporary files, or other ephemeral
17 data that are difficult to preserve without disabling the operating system.
18 c. On-line access data such as temporary internet files, history, cache,
19 cookies, and the like.

20 d. Data in metadata fields that are frequently updated automatically, such as
21 last-opened dates (see also Section (E)(5)).

22 e. Back-up data that are substantially duplicative of data that are more
23 accessible elsewhere.

24 f. Server, system or network logs.

25 g. Data remaining from systems no longer in use that is unintelligible on the
26 systems in use.

1 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or
2 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a
3 copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop,
4 desktop computer, or “cloud” storage).

5 i. Electronic data (e.g. email, calendars, contact data, and notes) sent to or
6 from personal email accounts (e.g., Gmail, Apple Mail, Hotmail).

7 **D. Privilege**

8 1. With respect to privileged or work-product information generated after the
9 filing of the complaint, parties are not required to include any such information in privilege
10 logs.

11 2. Activities undertaken in compliance with the duty to preserve information are
12 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

13 3. Information produced in discovery that is protected as privileged or work
14 product shall be immediately returned to the producing party, and its production shall not
15 constitute a waiver of such protection, if: (i) such information appears on its face to have been
16 inadvertently produced; or (ii) the producing party provides notice within 15 days of discovery
17 by the producing party of the inadvertent production.

18 **E. ESI Discovery Procedures**

19 1. On-site inspection of electronic media. Such an inspection shall not be permitted
20 absent a demonstration by the requesting party of specific need and good cause or by
21 agreement of the parties.

22 2. Search methodology. The parties shall timely attempt to reach agreement on
23 appropriate search terms, or an appropriate computer-aided or technology-aided methodology,
24 before any such effort is undertaken. The parties shall continue to cooperate in revising the
25 appropriateness of the search terms or computer- or technology-aided methodology. In the
26 absence of agreement on appropriate search terms, or an appropriate computer- or technology-

1 aided methodology, the following procedures shall apply:

2 a. A producing party shall disclose the search terms or queries, if any, and
3 methodology that it proposes to use to locate ESI likely to contain discoverable information.

4 The parties shall meet and confer to attempt to reach an agreement on the producing party's
5 search terms and/or other methodology.

6 b. If search terms or queries are used to locate ESI likely to contain
7 discoverable information, a requesting party is entitled to no more than five additional terms
8 or queries to be used in connection with further electronic searches absent a showing of good
9 cause or agreement of the parties. The five additional terms or queries, if any, must be
10 provided by the requesting party within 14 days of receipt of the producing party's
11 production. Each party can request modification of a search term and/or propose alternative
12 search terms in the event any of the additional terms cause issues such as false positive or
13 negative results.

14 c. Focused terms and queries should be employed; broad terms or queries,
15 such as product and company names, generally should be avoided. Absent a showing of
16 good cause, each search term or query returning more than 250 megabytes of data are
17 presumed to be overbroad, excluding Microsoft PowerPoint files, image and audio files, and
18 similarly large file types.

19 d. The producing party shall search both non-custodial data sources and
20 ESI maintained by the custodians identified above.

21 3. Format. The parties agree that ESI will be produced to the requesting party with
22 searchable text, in a format to be decided between the parties. Acceptable formats include, but
23 are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted
24 text file as well as load files for e-discovery software with metadata), or single-page TIFFs
25 (only with load files for e-discovery software that includes metadata fields identifying natural
26 document breaks and also includes companion OCR and/or extracted text files). Unless

1 otherwise agreed to by the parties, files that are not easily converted to image format, such as
2 spreadsheet, database and drawing files, should be produced in native format. Additionally,
3 any files that cannot have an image representation, e.g. video files, should also be produced in
4 native format.

5 a. Each document image file shall be named with a unique Bates Number
6 (e.g. the unique Bates Number of the page of the document in question). File names should
7 not be more than twenty characters long or contain spaces. When a text-searchable image file
8 is produced, the producing party must preserve the integrity of the underlying ESI, i.e., the
9 original formatting, the metadata (as noted below) and, where applicable, the revision history.
10 The parties shall produce their information in the following format: single-page images and
11 associated multi-page text files containing extracted text or with appropriate software load
12 files containing all requisite information for use with the document management system
13 (e.g., Concordance® or Summation®), as agreed to by the parties.

14 b. If appropriate to the particular case, the parties shall consider whether
15 or not the full text of each electronic document shall be extracted (“Extracted Text”) and
16 produced in a text file. If the parties so agree, the Extracted Text shall be provided in
17 searchable ASCII text format (or Unicode text format if the text is in a foreign language) and
18 shall be named with a unique Bates Number (e.g. the unique Bates Number of the first page of
19 the corresponding production version of the document followed by its file extension).

20 c. If a document is more than one page, the unitization of the document and
21 any attachments and/or affixed notes shall be maintained as they existed in the original
22 document.

23 4. De-duplication. The parties may de-duplicate their ESI production across
24 custodial and non-custodial data sources after disclosure to the requesting party.

25 5. Metadata fields. If the requesting party seeks metadata, the parties agree that
26 only the following metadata fields need be produced: document type; custodian and duplicate

1 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
2 path; date and time created, sent, modified and/or received; and hash value.

3 DATED: December 7, 2018.
4

5 TRUXEDO, INC. EXTANG CORP.
6

7 By /s/ Emily J. Harris By /s/ Emily J. Harris
8

9 TYGER AUTO, INC.
10

11 By /s/ Ambika K. Doran
12

ORDER

13 Based on the foregoing, IT IS SO ORDERED.
14

15 DATED: December 10, 2018
16

17 
18 RICARDO S. MARTINEZ
19 CHIEF UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26